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No. 82-1070

In the Supreme Court of the United States

OCTOBER TERM, 1982

PAUL ROBERTS BENEDETTO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

FRANCIS J. MARTIN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the procedures employed by the distict court to ensure that petitioner's blindness did not interfere with the fairness of his trial were unreasonably limited and deprived petitioner of his Sixth Amendment rights to confront witnesses and to assistance of counsel.

2. Whether petitioner was deprived of the benefit of the privilege against self-incrimination by the mere possession by FBI agents and the federal prosecutor of a statement made by petitioner to German police after he had been told by an FBI agent that any statement given would not be introduced in evidence against him in a federal prosecution, except for impeachment purposes.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. A-1 to A-10) is unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on September 15, 1982. A petition for rehearing was denied on October 27, 1982 (Pet. App. A-11 to A-12). The petition for a writ of certiorari was filed on December 23, 1982 as of November 26, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on 22 counts of mail and wire fraud, in violation of 18

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[1]Pursuant to Second Circuit Rule 0.23 and the terms of the order itself this unpublished disposition has no precedential value.

U.S.C. 1341, 1343 and 2, and two counts of causing persons to travel interstate in connection with a scheme to defraud in violation of 18 U.S.C. 2314 and 2. Petitioner was sentenced to concurrent terms of 21 months' imprisonment on 11 of the counts; sentence was suspended on the remaining counts. Petitioner was also placed on probation for a three-year period to commence with his release from incarceration.

The evidence showed that petitioner and his co-defendants[2] participated in a fraudulent scheme to induce persons seeking bank loans for various business projects to pay the defendants money in reliance upon their promises to obtain financing for these projects. During the period charged in the indictment, the participants in the fraudulent scheme received over $250,000 in advance fees from would-be borrowers, but none of these borrowers received any of the financing for their projects that had been promised by petitioner and his co-defendants. Nor did any of the defrauded borrowers succeed in securing a refund of the loan fees paid. Eight sets of borrowers were defrauded in this manner. Each transaction was an extended affair involving repeated promises of funding, and repeated assurances designed to allay the borrower's suspicion when the promised funding was not forthcoming (see Pet. App. A-3).[3]

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[2]Eleanore Doroshow, William Mann, Robert Edwards and Ely Ades. Co-defendant Frank Roder was acquitted.

[3]Because petitioner does not dispute the sufficiency of the evidence or, indeed, his actual guilt of the offenses of which he was convicted, we do not summarize further the facts of the eight fraudulent episodes, as developed during petitioner's 11-week trial. These matters are reviewed at pages 3-23 of the government's brief in the court of appeals.

Petitioner's defense was essentially that he had believed in good faith that his co-defendant (William Mann) was able to obtain the promised funding for the loans in question.

ARGUMENT

1. Petitioner contends (Pet. 25-40) that the special procedures employed by the district court to insure that his blindness did not impair his ability to receive a fair trial were inadeq. ate and thus deprived him of his Sixth Amendment rights to counsel and confrontation of witnesses. He also complains that the court did not hold a hearing to determine whether medication he took to control an elevated blood pressure condition impaired his ability to participate in the trial. These claims do not warrant further review.

a. At the time of trial petitioner was 59 and had been blind from birth. Because of petitioner's blindness all government trial exhibits were premarked and provided to defense counsel long before trial, and Jencks Act material was provided two days in advance of each witness' testimony rather than following direct examination. Compare 18 U.S.C. 3500(a) and (b). Petitioner was provided with a Braille-writer in order to take notes during trial and was permitted to tape record the trial proceedings. An escort was provided for petitioner by the Court. During petitioner's cross-examination an interpreter stood by his side to read to him any documents relevant to the questioning. (7/27/81 Tr. 7-21; see also C.A. App. 282a-283a.)[4]

Petitioner claims that these measures were insufficient and that he was denied fundamental rights by the district court's failure to make further accommodations that he

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[4]"C.A. App." denotes the joint appendix filed in the court of appeals.

requested. Petitioner wished to have all trial exhibits translated into Braille, to have all Jencks material delivered two weeks before trial, and to have all trial exhibits read to him when introduced. In denying this request the court was careful to note that petitioner would have ample time before trial to have the exhibits read to him. Furthermore, the court agreed to grant brief recesses during trial if it were necessary for defense counsel to consult with petitioner concerning any document which had not previously been made available (7/27/81 Tr. 17-19). Significantly, petitioner does not point to any instance in which such a recess was sought and denied.

Petitioner was entitled to a fair opportunity to defend against the government's accusations. See *Chambers* v. *Mississippi*, 410 U.S. 284, 294 (1973). This he was afforded, for given the special arrangements made his blindness did not preclude effective participation in the trial. Petitioner could hear and understand all of the testimony and had been afforded ample opportunity to become familiar with all of the trial exhibits. Petitioner's capacity to follow the trial proceedings was at least equivalent to that of a juror, who typically hears the testimony but is not given the opportunity to read the trial exhibits as they are introduced. A far greater impairment exists if a defendant is deaf and cannot hear the proceedings at all, *Ferrell* v. *Estelle*, 568 F.2d 1128, opinion withdrawn, 573 F.2d 867 (5th Cir. 1978),[5] or if a defendant cannot understand the English language, see *United States* v. *Martinez*, 616 F.2d 185 (5th Cir. 1980). Yet even in those contexts the trial court retains substantial discretion to determine what special procedures should be instituted to assure a fair trial. See *Perovich* v.

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[5]The court's opinion in *Ferrell* was withdrawn when it learned that the habeas petitioner had died before issuance of its mandate.

United States, 205 U.S. 86, 91 (1907); *United States* v. *Martinez, supra*, 616 F.2d at 188; *Ferrell* v. *Estelle, supra*, 568 F.2d at 1133. See also *People ex rel. Myers* v. *Briggs*, 46 Ill.2d 281, 263 N.E. 2d 109, 113 (1970).

The district court did not abuse its discretion in this case. Petitioner's ability to participate in his trial was not impaired. He was able to hear and comprehend all of the proceedings; an interpreter was provided to read documents to him during cross-examination. Absent a particularized claim of prejudice there is no warrant for further consideration of petitioner's contention that the district court abused its discretion in declining to accede to petitioner's additional demands.[6]

In any event, the unpublished judgment order of the court of appeals does not explicitly address this claim. That order, moreover, has no precedential value. See page 1 note 1, *supra*. Petitioner asserts (Pet. 27) that his contention embodies a matter of first impression in the federal court system. Plainly there is no conflict of authority here such as would warrant further review.

b. Petitioner also contends (Pet. 35-39) that approximately four weeks after the trial began he became unable properly to participate therein as a result of alleged side effects of certain medication he was taking to relieve high

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[6]Petitioner also contends (Pet. 57-58) that he was prejudiced by an alleged failure to comply with Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. (Supp. V) 794, which prohibits certain discrimination against handicapped individuals. As shown above, sufficient accommodation was made to assure that petitioner's blindness did not interfere with his right to a fair trial, and accordingly he cannot claim to have been discriminated against on that basis. In any event, Section 504 applies only to federally assisted activities and programs or activities conducted by executive branch agencies of the United States. We question whether a federal criminal trial can be deemed a "program or activity conducted by an[] Executive agency" (29 U.S.C. (Supp. V) 794).

blood pressure. This condition was brought to the attention of the district court. Following a telephone conversation with one of petitioner's doctors the district court decided to proceed with the trial. Petitioner now argues (Pet. 36-38) that the district court should have conducted a hearing to determine petitioner's competence to continue with the trial. But petitioner does not claim that he made any contemporaneous request for an evidentiary hearing, or that timely objection was made to the procedures employed by the court. (Moreover, petitioner did not raise this claim in the court of appeals, and consideration here is accordingly inappropriate). In the circumstances the trial judge could justifiably rely upon his ample opportunity to observe petitioner during the trial (coupled with his communication with petitioner's physician) in deciding to proceed with the trial. See *United States* v. *Grimes*, 641 F.2d 96, 98-99 (3d Cir. 1981); *United States* v. *Oliver*, 626 F.2d 254, 258-259 (2d Cir. 1980).

2. Petitioner contends (Pet. 41-56) that the government's case was tainted by a statement he had voluntarily given to German police investigators, who were accompanied at the time by an FBI agent and translator as a matter of international courtesy. Petitioner was told by the FBI agent on that occasion that he was not a target of the German investigation but that he was a subject of an ongoing FBI investigation (7/29/81 Tr. 126-129). A tape recording of the session with German police, admitted in evidence at a pre-trial hearing on petitioner's motion to quash his indictment, reveals that FBI Agent Zane told petitioner, before he began his statement:

> Any statement that you do make to the German police at this time will not be held against you in the United States Courts in the event of any eventual

> prosecution of yourself except for impeachment purposes if you take the stand in your defense in any subsequent criminal trial.

In the pretrial proceedings petitioner argued that this statement effected a grant of transactional immunity with respect to his activities as a loan broker disclosed to the German police. After an evidentiary hearing at which petitioner and the FBI agent testified, and the tape was played, the court rejected that claim, noting that Agent Zane's statement is "explicitly inconsistent with any concept of transactional immunity" because the possibility of prosecution of petitioner was mentioned (7/29/81 Tr. 179). The court reserved for post-trial determination the question whether "the government has used [petitioner's] statement in a manner inconsistent with" the representation made by Agent Zane (*id.* at 182).[7]

After petitioner was convicted, the court held a second evidentiary hearing to determine the issue previously reserved. After hearing the testimony of the only prosecutor connected with the investigation, the court tentatively concluded that improper use had not been made of petitioner's statement, and that petitioner's claim that the investigation had been tainted in an unspecified manner was based, at most, upon the theory that prosecutorial interest in petitioner was heightened after petitioner made his statement. Mere generation of prosecutorial interest, the court observed, was not impermissible even if full use immunity had been granted. Petitioner's "taint" claim accordingly fell with his previously rejected transactional immunity claim

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[7]This question incorporated two subsidiary inquiries, first, whether Agent Zane's statement granted *derivative* use immunity, and second, if so, whether the government's investigation somehow had made indirect use of the statement. The government represented that the statement would not be employed at trial (7/29/81 Tr. 168), and it was not.

(1/7/82 Tr. 178-180, 185, 205-206). Nevertheless, in response to petitioner's request, the court directed the United States Attorney's Office to submit affidavits from supervisory prosecutors to be certain that petitioner's statement had not affected their actions in the case. Those affidavits confirmed that the statement played no role in the investigation. See Affidavit of Shirah Neiman, Assistant United States Attorney (Jan. 11, 1982).

The district court issued a comprehensive opinion on post-trial motions on January 29, 1982 (C.A. App. 279a-293a).[8] The court found, based upon the evidentiary hearing testimony and the affidavits submitted (*id.* at 285a): "[T]here has been no use of the statement or use of information derived therefrom contrary to the representations made to [petitioner]."

On appeal petitioner abandoned his taint contention, pursuing only the claim that transactional immunity had been granted (Br. 23-33). The court of appeals rejected that contention, noting, as had the district court, that the possibility of prosecution was made explicit in Agent Zane's statement to petitioner (Pet. App. A-5 to A-6). The court also observed, sua sponte (*id.* at A-6):

> [T]he district judge found that the Government did not use any of the information it may have received in violation of Agent Zane's representations, and [petitioner] has not shown that the court's findings are clearly erroneous.

Petitioner now seeks to revive his taint claim, which he elected not to press below. Consideration of such a claim is ordinarily inappropriate. See *United States* v. *Mitchell*, 445 U.S. 535, 546 n.7 (1980). We recognize that the court of

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[8]Petitioner has neither reproduced this opinion in the appendix to the petition nor adverted to its contents in recounting the facts of the case.

appeals reached out to reject petitioner's present fact-bound contention in passing. But because the court of appeals did not decide any legal question of general importance in the process its comment on this score provides no basis for departure from the Court's usual practice of declining to review claims not advanced on appeal. Cf. *Woelke & Romero Framing, Inc.* v. *NLRB*, No. 80-1798 (May 24, 1982), slip op. 20-21. In any event, as the court of appeals observed, petitioner has not demonstrated that the district court's finding was clearly erroneous. Given the fact-bound nature of the ruling and the absence of any published opinion, further review is not warranted.[9]

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[9]Petitioner's suggestion that the decision below conflicts with *United States* v. *McDaniel*, 482 F.2d 305 (8th Cir. 1973), is incorrect. In *McDaniel* the court emphasized that the United States Attorney had twice read the defendant's immunized grand jury testimony prior to indictment *without knowing* the testimony had been given under a grant of immunity. The court of appeals held that under such circumstances the government faced an insurmountable task in establishing that there was no taint. 482 F.2d at 311-312. In petitioner's case the prosecution was fully aware of the immunized nature of the testimony and did not attempt to make any use of it. See Pet. App. A-21 to A-29. The *McDaniel* court stressed that the circumstances in that case were extraordinary and that the question of impermissible use is ordinarily to be decided (as it was here) on the basis of an evidentiary hearing, rather than an irrebuttable presumption. 482 F.2d at 312.

McDaniel is additionally distinguishable because there, unlike the present case, the defendant invoked his Fifth Amendment privilege. The scope of any "immunity" here is dictated not by the Fifth Amendment—petitioner was not compelled to make a statement to the German authorities—but by the terms of Agent Zane's representation respecting use. That representation on its face merely precludes introduction of petitioner's statement in evidence, and does not preclude indirect investigatory use. Petitioner's claim that such use was made here was, of course, determined to be unfounded. But even if that determination were incorrect, Agent Zane's representation plainly was not dishonored.

Petitioner's further complaint (Pet. 23-24, 41-42, 48; see also Pet. 16-22) that the district court improperly limited the scope of the taint inquiry is based upon a distortion of the record. Contrary to the impression the petition fosters (see page 8 note 8, *supra*), the district court did not rule upon the taint claim at the close of the hearing on January 7, 1982. Rather the court required the government to supply affidavits from the very Assistant United States Attorneys that petitioner claims should have been heard from (see page 8, *supra*). Only after receiving those affidavits did the court rule, on January 29, 1982, that there had been no improper use of the statement made by petitioner to German police.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

FRANCIS J. MARTIN
Attorney

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[10]Petitioner's speculative charges (Pet. 48) respecting a meeting between FBI Agent Fuller and Assistant United States Attorney Neiman are directly contrary to AUSA's uncontradicted statement that "[a]t no time during that meeting was there any reference to any interview or meeting with [petitioner] attended by the FBI" (Affidavit of Shirah Neiman, *supra*, at 1).

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